Supreme Court, U.S.
FILED

091213 APR 7- 2010

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT of the UNITED STATES

TIMOTHY CHARLES LAMB,

Petitioner,

v.

STATE BOARD OF LAW EXAMINERS,
STATE OF NORTH DAKOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH DAKOTA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether the lower court's ruling violates the due process clause of the Fourteenth Amendment to the United States Constitution and conflicts with relevant United States Supreme Court decisions because it denies the Petitioner access to information or evidence under the state's public records during a formal fact-finding hearing that challenges the validity of a professional licensure examination before a state board?

2) Whether the state court's rule prohibiting access to public records regarding critical evidence in the development of the bar exam, which determines the professional licensure and employment of an applicant – including the non-disclosure of the rationale for the cut off score, training of essay exam scorers, and test security measures – is void for being vague and overboard since it offends the due process clause of the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

There are two parties in this case. The Petitioner, Timothy C. Lamb (hereinafter Lamb), is an applicant for admission to the bar of North Dakota. The Respondent, the North Dakota State Board of Law Examiners (hereinafter the State Board), is the state licensing board for bar admissions in North Dakota.

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which determines licensure and employment of an applicant – including the non-disclosure of the rationale for the cut score, training of essay exam scorers, test security measures, and other information regarding normally acceptable test setting standards – should be void for vagueness and overbreadth since it offends the due process clause of the Fourteenth Amendment to the United States Constitution. 15

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL RECORD

The citations from the lower courts are listed as follows: Lamb v. State Board of Law Examiners, State of North Dakota, 2010 ND 11, 777 N.W.2d 343, N.D. Supreme Court No. 20090131, filed on January 12, 2010; and Lamb v. State Board of Law Examiners, State of North Dakota, District Court, Grand Forks County, N.D., Memorandum Decision and Order, Civil No. 08-C-1963, filed on December 31, 2008. See copies of opinions at Appendix.

STATEMENT OF JURISDICTION

Under the Rules of the Supreme Court of the United States, as adopted on January 12, 2010, this Court has jurisdiction of this matter pursuant to Rule 10(c), where a state court of last resort, the North Dakota Supreme Court, has decided an issue that is an important question of federal law that conflicts with the Constitution of the United States and relevant decisions by this Court. Id., Rule 10(c).

Pursuant to Rule 29.4(c), Rules of the Supreme Court of the United States, notification was given to the North Dakota Attorney General that a provision under the North Dakota Admission to Practice Rules promulgated by the North Dakota Supreme Court has been challenged under the U.S. Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

This petition for a writ of certiorari involves the Fourteenth Amendment to the United States

Constitution, which states in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." 14th Amendment, U.S. Constitution.

STATEMENT OF THE CASE

This case comes before the United States Supreme Court for a grant of a writ of certiorari from a decision by the North Dakota Supreme Court. The two parties are: Timothy C. Lamb ("Lamb"), the Petitioner, and the North Dakota State Board of Law Examiners ("State Board"), the Respondent. This case involved a request for public record information pursuant to a formal hearing before the State Board regarding Lamb's failed February 2008 bar examination. Appendix at 2a - 3a. Lamb made application to the bar of the state of North Dakota under its bar examination procedure. Id. The State Board made a negative recommendation to the North Dakota Supreme Court for Lamb's admission to the bar based upon his failing score. Id. After failing by a narrow margin of the cut off score, Lamb challenged the validity, reliability and fairness of the testing procedures and test development under generally accepted standards in professional licensure exams. Id. The pass rate for the February 2008 North Dakota bar exam was 47 percent. Comprehensive Guide to Bar Admission Requirements, the National Conference of Bar Examiners (2009). In effect, he attempted to discover information regarding the credibility of the

exam procedures to ensure that they were not arbitrary with regard to the cut off score, essay scoring methods, graders' training, grading techniques, security measures, etc. App. at 2a - 3a. Because of the State Board's denial of the information, Lamb sought a writ of mandamus to compel the State Board to release the information. Id. at 3a. The State Court upheld a state district court's decision to deny the writ of mandamus because Lamb had no "legal right" to the public records. Id. at 17a.

The State Board provided Lamb with some information with regard to its annual pass/fail statistical reports and copies of his essay exam test questions with model answers. Id. at 3a - 4a. However, the State Board failed to provide essential information regarding its cut score rationale, its training procedures for graders, test security measures, and other test development related material that Lamb specifically requested. Id. at 2a - 3a.

Although the State Constitution of North Dakota provides that "all records of public or governmental bodies, boards, [etc.], shall be public records, open and accessible for inspection[,]" [N.D. Const., Art. IX, § 6] the lower court ruled against Lamb's request for the public records because of a State Court rule, Rule 13, N.D. Admission to Practice Rules. App. at 4a and 13a - 14a. The State Court rule states that "all records maintained by the [State Board] ... shall be confidential except as provided by these rules." Id. and Rule 13, N.D. Admission to Practice Rules. A North Dakota state statute codifies the Open Records Law of the State Constitution (see N.D.C.C. § 44-04-18), but the State Court ruled that it has equal power to the state

legislature, so its rule does not conflict with any state provision. App. at 12a - 17a.

However, the State Court's decision did not address the U.S. Constitution in its opinion, which the Petitioner's Brief argued was relevant and applicable. The lower court opined that his U.S. Constitution argument was "unnecessary to our decision or without merit." Id. at 17a. In summary, the State Court determined that its court rule was not in conflict with the State Constitution because it also allows the State Court to make its own rules regarding admissions to the bar, that is, Rule 13, N.D. Admission to Practice Rules. Id. at 6a, 17a.

In pertinent part, the lower court held:

> "Under the constitutional authority to promulgate rules that govern the admission to practice law in North Dakota, this Court adopted the Admission to Practice Rules. In 1990, we adopted a rule specifically exempting board records from public disclosure. Admission to Practice R. 13, Comment. Admission to Practice R. 13(A) provides that '[a]ll records maintained by the Board regarding applications for admission to practice law, all examination materials, and all proceedings by the Board shall be confidential except as provided by these rules.'"

App. at 13a - 14a.

ARGUMENT FOR GRANTING CERTIORARI

This case seeks a grant of a writ of certiorari for compelling reasons. The facts in this case show that the Petitioner was denied access to public records that are essential to his assertion that the professional licensure examination he took in February 2008 was unreliable, invalid and unfair, and the resulting decision by the State Board to deny his application for admission to the bar was arbitrary. The State Court's deprivation of public record information in a formal proceeding does not comport with the fundamental fairness and justice that is guaranteed under the due process clause of the Fourteenth Amendment to the United States Constitution. 14th Amendment, U.S. Constitution. Nor does the lower court's decision square with relevant United States Supreme Court decisions. The State Court's unreasonable and unjustified precedent undermines the essence of the due process clause and our country's longstanding history of fair play in our system of jurisprudence.

I. The State Court's decision violates the due process clause of the Fourteenth Amendment to the United States Constitution and conflicts with relevant United States Supreme Court decisions because it denies the Petitioner access to information or evidence that is maintained under the state's public records during a formal fact-finding proceeding that impacts the Petitioner's professional

licensure and employment.

The requirements of due process depend on the nature of the proceeding, nature of the due process right under review, and the possible detriment on the proceeding being conducted. Hannah v. Larche, 363 U.S. 420 (1960). Therein, the United States Supreme Court stated, in relevant part:

> "'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account."

Hannah v. Larche, supra, at 442.

In the case before the Court, the nature of the right involved is the right to access public record information in a proceeding that affects the professional licensing and employment of the Petitioner. Releasing the information is not a burden on the State Board. Lamb is not seeking names, identities, scores, or actual testing material of the bar exam, which may truly be classified as "confidential" information. He is requesting information on how the test is developed under standard setting measures. The formal proceeding is the first and final step in the fact finding process to review any complaints with the bar exam. The next step in the process, as per the N.D. Admission to Practice Rules, is an appellate style appeal to the State Court. That is the same court that denied Lamb's appeal for a writ of mandamus to compel the information from the State Board. The factors in this case should satisfy the Hannah due process test.

Regarding due process, the Supreme Court decided in another case, Marshall v. Jerrico, Inc., 446 U.S. 238 (1980), that "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process." Marshall v. Jerrico, Inc. at 242.

In this case, Lamb's right to due process was deprived because the State Court denied essential

information that is in the public domain and in the records of the State Board. His case involved a professional test to determine his admission to the bar in North Dakota. He was denied admission based on the results of his test. His score was very close to passing in an exam that had a very low pass rate of less than 50 percent, so he petitioned the State Board in a formal hearing process. The next step in the process is to request review before the lower court, the North Dakota Supreme Court. Thus, the review process is at a critical stage in fact finding or discovery. This review process is a requirement for licensure for employment. Under this process, no further fact finding can be made after the State Board proceeding. In effect, the lower court's ruling cuts off Lamb's effort to meet his burden of proof under the rational basis test, which is to prove the state acted arbitrarily and capriciously in its test licensure procedure. The ruling makes the state or any individual acting under color of the law, in effect, immune from any liability or accountability. The State Court's ruling is repugnant to the U.S. Constitution and this Court's long history of defending the Due Process Clause. Hurtado v. California, 110 U.S. 516 (1884), and its progeny.

This case before the Court is similar to the case of Greene v. McElroy, infra, where a federal governmental action by several security clearance boards was reviewed as judicial in nature. In Greene, the Court found that although there was not an investigation involved as was the circumstances in Hannah, supra, the boards were determining whether to issue Greene a security clearance, which in effect, was a license to do his job, and had a significant impact on his employment. Greene v.

McElroy, 360 U.S. 474, 475 (1959). Greene was applying for a security clearance and the government boards denied it based on confidential information that he was not allowed to see. Greene v. McElroy, at 474. The case involved the "validity" of the security clearance process. Id. at 475.

In Greene, the Court held: "The issue, as we see it, is whether the Department of Defense has been authorized to create an industrial security clearance program under which affected persons may lose their jobs and may be restrained in following their chosen professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination." Id. at 493. Thus, the Court avoided confronting the issue of due process as it relates to liberty and property under the Fifth Amendment of the Constitution as applied to the federal government. The Court stated, in pertinent part:

> "Petitioner contends that the action of the Department of Defense in barring him from access to classified information on the basis of statements of confidential informants made to investigators was not authorized by either Congress or the President and has denied him "liberty" and "property" without "due process of law" in contravention of the Fifth Amendment. The alleged property is petitioner's employment; the alleged liberty is petitioner's freedom to practice his chosen profession. Respondents admit,

> as they must, that the revocation of security clearance caused petitioner to lose his job with ERCO [Greene's employer] and has seriously affected, if not destroyed, his ability to obtain employment in the aeronautics field. Although the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the Fifth Amendment, Dent v. West Virginia, 129 U.S. 114; Schware v. Board of Bar Examiners, 353 U.S. 232; Peters v. Hobby, 349 U.S. 331, 352 (concurring opinion); cf. Slochower v. Board of Education, 350 U.S. 551; Truax v. Raich, 239 U.S. 33, 41; Allgeyer v. Louisiana, 165 U.S. 578, 589 - 590; Powell v. Pennsylvania, 127 U.S. 678, 684, respondents contend that the admitted interferences which have occurred are indirect by-products of necessary governmental action to protect the integrity of secret information and hence are not unreasonable and do not constitute deprivations within the meaning of the Amendment."

Greene at 492.

Finally, in Greene, the Court held, "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual,

and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." Greene at 496. The Court concluded that, "In the instant case, petitioner's work opportunities have been severely limited on the basis of a fact determination rendered after a hearing which failed to comport with our traditional ideas of fair procedure. ... We decide only that ... the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." Id. at 508.

In the Greene case, the lower court's decision was reversed and remanded by the United States Supreme Court. Id. Other relevant cases conflict with the State Court's decision in this case, as well. See, e.g., Zinermon v. Burch, 494 U.S. 113, 115-126 (1990), holding, "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not it itself unconstitutional, what is unconstitutional is the deprivation of such an interest *without due process of law*;" and Brewer v. Chauvin, 938 F.2d 860, 864 (8th Cir. 1991), stating, "A plaintiff's due process rights are not violated because his property is taken from him, his rights are violated because he was denied a certain amount of process *before* his property was taken." (Emphasis added.)

In this case, Lamb's employment opportunities (a liberty and property protected right under the 5th and 14th Amendments to the U.S. Constitution, as defined in Greene, supra, at 492) have been severely affected by a State Board that has deprived him of public records in a proceeding

that does not comport with "our traditional ideas of fair procedure," but also, a proceeding that is judicial in nature and does not afford "the safeguards" inherent in due process. The evidence Lamb seeks is essential to his case. It is not "confidential" information, and should place no burden on the state to produce. He is asserting that he is competent to practice law, and that the bar exam may be flawed in testing what it takes to be minimally competent to practice law in North Dakota. Minimum competency is the generally acceptable standard for professional licensure exams.

Experts in the field agree that professional licensure exams involve high stakes and require "the use of empirical, criterion-related data for the establishment of cut scores." Setting Performance Standards: Concepts, Methods, and Perspectives, Gregory J. Cizek (Lawrence Erlbaum Associates, 2001), at 34. In addition, Cizek writes, "Misclassifications of those not minimally competent pose risks to the public health, safety, and welfare, making licensing decisions 'high stakes.' Because licensure prevents those not so authorized from engaging in the applicable profession or occupation, the stakes for the applicant are also very high." Id. at 427. In other words, test takers are stakeholders in the exam standard-setting process, and they have a right to know how the high stakes exam was developed, just as the public has a right to know.

In the final analysis, this expert authority found, "Setting a standard to be high enough to provide protection for the public, but not so high as to exclude competent applicants from practicing, is a difficult task with serious consequences. Given the consequences, ... it is in the best interest of a licensing authority or the certifying entity and the

public it serves to have as much evidence as possible available to support its standard-setting judgment." Id. at 442. Therefore, if the high stakes professional licensure exam does not meet generally acceptable standards, stakeholders have a legitimate complaint and a right to challenge the exam results.

Lamb's request for information from the State Board, in fact, should add credibility to its professional licensure exam if released. Transparency in testing procedures is at the heart of the credibility, validity and reliability of its results, according to national licensing boards accreditation agencies. See, e.g., the National Commission for Certifying Agencies (NCCA), and its generally accepted standards. Instead, the State Board has chosen to suppress the standard-setting information as "confidential." That decision triggers suspicion rather than confidence in the exam development and grading procedures. Lamb is not seeking any personal information of test takers, nor is his seeking insights into test questions or answers.

Therefore, the gravity of this due process violation is paramount. Petitioner's fact-finding ability has been cut short during a proceeding that is judicial in nature and has a significant impact on his license for employment opportunity. Denying access to public record information in this employment related licensing process is fundamentally unfair, unreasonable and unjustified.

Lamb's request for information or his discovery motion during the formal proceeding process should not be confused with seeking the State Court's judicial records. This proceeding is before a state board with the statutory authority in licensing attorneys by a testing procedure. The Petitioner is seeking to determine if the State Board

is abiding by generally acceptable standards in the test development field. If the State Board is not using acceptable standards in the test development and grading process, the test becomes questionable with respect to its validity, reliability and fairness. In effect, if it is not following acceptable standards, any decision based on potentially flawed test results could be deemed arbitrary and capricious, which would not withstand the rational basis test under the U.S. Constitution. 14th Amendment, U.S. Constitution. The State Board or individuals acting under color of law could also be held liable under civil rights and anti-trust federal laws.

Because of the lower court's ruling, which is based on the State Court's rule, Lamb's heavy burden of proof can never be met under these conditions. At best, under the State Court's ruling, one would have to assume that the state is not capable of making a misclassification or misjudgment in this high stakes decisionmaking. At worst, if the state had a malicious, vindictive or prejudicial intent, it could cover it up by denying access to critical public information; and thus the public's interest and welfare is not properly served. In effect, this insulates the government from any proof of allegations of malfeasance or misclassification. Consequently, the State Board can effectively continue to operate in an unaccountable manner by denying access to its public records. The bad law precedent in this case cannot be allowed to stand. It brings violence to the United States Constitution. The lower court's decision is repugnant to the decisions of the United States Supreme Court in Hanna, Marshall, and Greene, supra. The Petitioner's due process rights have been violated by the ruling of the State Court, and it must

be overturned to allow justice to prevail.

II. **The State Court's rule prohibiting access to public records maintained by a state board regarding critical evidence in the development of the bar exam, which determines licensure and employment of an applicant – including the non-disclosure of the rationale for the cut score, training of essay exam scorers, test security measures, and other information regarding normally acceptable test setting standards – should be void for vagueness and overbreadth since it offends the due process clause of the Fourteenth Amendment to the United States Constitution.**

The State Court's decision relied solely on its own rule, Rule 13, N.D. Admission to Practice Rules, which states in relevant part: "[a]ll records maintained by the Board regarding applications for admission to practice law, all examination materials, and all proceedings by the Board shall be confidential except as provided by these rules." Appendix at 13a - 14a. The records exempted from the rule include names and addresses of applicants, pre-legal colleges attended, law schools attended, names and addresses of persons who have passed the bar and met admission requirements, and statistical data as authorized by the State Court. Id. at 14a. In effect, the rule excludes access to public records regarding the cut score determination, graders training program, test security, and minutes of the State Board meetings. Even if personal

information and test material were redacted from the public records, they are still considered "confidential" or a government secret under this rule.

Considering the facts in this case, the effect of the State Court's rule means that minutes of the State Board's meetings are "confidential" or held in secret since they are not included in the exceptions. App. at 14a. Without disclosure of the minutes of the meetings, there is no way to verify what the State Board has placed on its agenda or what business the board proceedings have accomplished. This puts a severe damper on the Petitioner's ability to prove any assertions regarding whether the State Board has made any deliberations on the cut off score of the exam or other standard setting determinations. Over the past 20 years, the North Dakota bar exam has changed. For example, the cut score has been modified from 125, to 130, to 260; the exam format has changed to include an essay Multistate Performance Test part; and it has recently added seven subject matter areas to the Multistate Essay Examination, including constitutional law, contracts, criminal law and procedure, evidence, real property, and torts. Those are the same subject areas that are tested exclusively in the Multistate Bar Examination, a 200 question multiple choice exam. See Comprehensive Guide to Bar Admission Requirements, the National Conference of Bar Examiners (years 1990-2009). The point in this discussion is that the cut score should be reviewed and reassessed after any changes in the exam to ensure its validity, reliability and fairness. See, Standards, infra. More importantly, the minutes should reflect what deliberations have been conducted with regard to setting the cut score;

otherwise, without evidence of deliberation on this factor, it would be an arbitrary decision. A possible consequence to this hands-off approach maybe the extreme range of the pass rate of the bar exam in North Dakota, ranging from 47 percent passing in February 2008 (the exam Petitioner failed by a small margin), to a 91 percent pass rate in 2001. Comprehensive Guide, supra. The minutes of the State Board's meetings during this time would show what, if anything, was done about this issue relating to the cut score. However, the minutes are "confidential" under the State Court's rule. App. at 13a - 14a. Petitioner argues that the rule patently denies due process on its face or as applied under the circumstances in this case.

Under the law, a statute, regulation or rule can be found unconstitutional on its face or as it is applied if it violates the U.S. Constitution. The basic law concerning the vagueness and overbreadth of authority has been established by the Supreme Court. A statute is void for vagueness when its prohibition is so vague as to leave an individual without knowledge of the nature of the activity that is prohibited. NAACP v. Button, 371 U.S. 415 (1963). To pass constitutional muster, the provision must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited ... [and] provide explicit standards for those who apply [it]" to avoid arbitrary and discriminatory enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). Even a clear, precise ordinance or law may be "overbroad" if it prohibits constitutionally protected conduct. Grayned, at 114. Once a law is determined to be constitutional as written, it may still be challenged if it was applied in an unconstitutional manner. Smith v. Goguen, 415

U.S. 566, 576 (1974); Palmer v. City of Euclid, Ohio, 402 U.S. 544 (1971).

The issue here is whether Rule 13, North Dakota Admission to Practice Rules is void because it does not give adequate notice of the public records access policy, which is contrary to the state's open records law, to an applicant who appeals his bar exam results before the State Board, or whether the rule is void because it prohibits "constitutionally protected" conduct under the due process clause of the Fourteenth Amendment to the U.S. Constitution because it prohibits information that should not be considered "confidential" and denies access during a formal hearing.

The rule prohibits the Petitioner from accessing public record information that is essential to proving his case against the State Board's administration of a professional licensing examination, which violates his due process rights, so it must be void as being unconstitutionally overbroad. It violates due process on its face or by how the State Court applied it. The rule conflicts with the Supreme Court's decisions in NAACP v. Button, Grayner, Smith, and Palmer, supra. See also, Chicago v. Morales, 527 U.S. 41 (1999) (holding that a loitering ordinance was void under the vagueness doctrine because it failed to give adequate notice and encouraged arbitrary enforcement); cf. Roberts v. United States Jaycees, 468 U.S. 609 (1984) (finding that the Minnesota Human Rights Act was not vague or overbroad where the Act was found to be violated by a non-profit organization's bylaws for not allowing women members).

Although the cases involving the void for vagueness and overbreadth doctrine primarily concern First Amendment free speech or criminal

law issues, the case before the bar falls within the broad scope of the purpose of doctrine. Here, we have an issue affecting a protected liberty and a due process right under the Fourteenth Amendment to the U.S. Constitution, so the doctrine should apply. If, for example, the rule prohibited a party from challenging the State Court's decision in the federal court system under the United States Constitution, it would undoubtedly be found void by the Supreme Court. Thus, the vagueness and overbreadth doctrine should apply in this case where Petitioner's constitutional rights have been violated by the application of a State Court rule.

The Petitioner is not seeking personal information or test materials. Lamb is requesting psychometric related data to assess whether the State Board is following acceptable standards in the field. For example, evidence of the cut score determination should be well documented, as experts in the field would strongly agree upon. For example, the Standards, infra, provide, "When a specific cut score is used to select, classify, and certify test takers, the method and rationale for setting that cut score, including any technical analyses, should be presented in a manual or report. When cut scores are based primarily on professional judgment, the qualifications of the judges also should be documented." Id. at 43.

Psychometricians are experts in this field of test validity. Like auditors, they check to ensure examinations comply with generally accepted standards in the field, whether for professional licensure, for college entrance, or for employment. See, e.g., Standards for Educational and Psychological Testing, prepared by the Committee to Develop Standards for Educational and

Psychological Testing of The American Educational Research Association, The American Psychological Association, and The National Council on Measurement in Education, updated in 1999. "The Standards is a technical guide that can be used as the basis for evaluating testing practices." Id. at 2.

In sum, certified public accountants audit the accounting books of entities to ensure they comply with generally accepted accounting standards; likewise, psychometricians, in effect, audit the records of testing agencies to ensure that they are following generally acceptable standards in the testing field. For example, they would perform a review to ensure the licensing authority is: setting the cut score under appropriate standards, ensuring adequate training of scorers is conducted, implementing sound test security measures, monitoring to ensure proper maintenance of its records, checking that proper reports are provided to the public and test takers, etc. Id. Psychometricians ensure there is transparency in the testing procedure, which leads to credibility, validity and reliability of the exam, and which protects the interests of both the public and the test takers. The State Court's rule will not allow for an analysis of its test setting standards by a psychometrician expert. The rule is vague and overbroad because it offends the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

Therefore, under the broad scope of this Court's decisions in NAACP v. Button, Grayner, Smith, Palmer, Chicago, and Roberts, supra, the rule in this case should be found to be void because it is vague and overbroad.

CONCLUSION

For the reasons stated above, the United States Supreme Court should grant Petitioner's writ of certiorari in this matter.

Dated in April 2010.

Respectfully submitted,

For the Petitioner
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Filed 1/12/10 by Clerk of Supreme Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2010 ND 11, 777 N.W.2nd 343

Timothy C. Lamb, Petitioner and Appellant

v.

State Board of Law Examiners,
State of North Dakota, Respondent and Appellee

No. 20090131

Appeal from the District Court of Grand Forks County, Northeast Central Judicial District, the Honorable Lawrence E. Jahnke, Judge.

AFFIRMED.

Opinion of the Court by Maring, Justice.

Timothy C. Lamb (argued), self-represented, petitioner and appellant.

Ronald H. McLean (argued), Special Assistant Attorney General, and Joseph A. Wetch Jr. (on brief), Serkland Law Firm, P.O. Box 6017, Fargo, ND 58108-6017, for respondent and appellee.

Lamb v. State Board of Law Examiners
No. 20090131

Maring, Justice.

[¶1] Timothy C. Lamb appeals from the district court's orders denying his motion to reconsider and his application for a writ of mandamus to require the State Board of Law Examiners to provide information about the February 2008 bar examination procedures. We affirm, concluding the district court did not abuse its discretion because Lamb does not have a clear legal right to the requested information.

I

[¶2] Based on the results of Lamb's February 2008 bar examination, the State Board of Bar Examiners recommended Lamb not be admitted to the Bar of North Dakota. Lamb requested a formal hearing under Admission to Practice R. 10(B) before the State Board of Law Examiners. Before the hearing, he moved for discovery requesting information about: (1) grading techniques; (2) how raw scores are converted; (3) whether the Board performs periodic assessments of its scores; (4) whether a report is available of psychometric procedures; (5) whether the Board has an ongoing assessment of its procedures; (6) what practices the Board uses in maintaining acceptable standards; (7) how the essay scoring judges are trained; (8) whether a content analysis has been conducted to measure the relationship of questions to being competent in the legal profession; and (9) security measures and related bar examination information. The Board's Hearing Panel denied his

motion, but provided information regarding: (1) selection and preparation of graders; (2) grading guidelines given to graders; (3) selection of test questions; (4) how often the pass fail policy is reviewed; (5) where the conversion and scaling of scores are performed; and (6) where the Multistate Performance Test and Multistate Essay Examination questions are prepared. Lamb also emailed the secretary-treasurer of the Board and requested information under the open records laws. In response, the Board provided its annual reports for the past ten years. Lamb requested an Attorney General's opinion on whether the Board had violated the open records law The Attorney General did not consider Lamb's request because Lamb submitted it more than thirty days after the alleged violation.

[¶3] Lamb applied for a writ of mandamus to the district court. In his application, he asked the district court to compel the Board to provide "certain requested information . . . which was submitted in a formal request to the Board, and denied." He also asked the court to order the Board to provide information and documentation regarding the February 2008 bar exam procedures, including "e-mails, phone messages, letters, memoranda, notes, minutes of meetings, training materials, and all relevant documentation." After the parties submitted briefs, the district court heard oral argument. The district court issued an order denying Lamb's application for a writ. In its order, the district court noted that the Board had provided Lamb with a great deal of information including: a copy of his two personal Multistate Performance Test question and answer booklets with the drafter's point sheet and model answers for each, a copy of his personal six

Multistate Essay Examination question and answer booklets and the analyses for those questions, and a copy of the North Dakota State Board of Law Examiner's Grading Guidelines. The court also stated it was unable to identify any confidentiality exceptions relevant to Lamb's case under the North Dakota Century Code, North Dakota Constitution, or North Dakota Admission to Practice Rules. Therefore, the court concluded that Lamb failed to establish he had a clear legal right to the information because he could not demonstrate the information was an exception to the confidentiality provisions of the Admission to Practice Rules or an open records exception under N.D.C.C. § 44-04-18.8. Lamb appeals both the memorandum decision and order denying his writ of mandamus and the order denying the motion to reconsider.

II

[¶4] Section 32-34-01, N.D.C.C., which governs a writ of mandamus, provides: "The writ of mandamus may be issued by the supreme and district courts to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station . . . ." It is within a district court's sound discretion whether to issue a writ of mandamus. Eichhorn v. Waldo Twp. Bd. of Supervisors, 2006 ND 214, ¶ 20, 723 N.W.2d 112. We will reverse a district court's decision concerning a writ of mandamus as an abuse of discretion only when it acts arbitrarily, capriciously, unreasonably, or if it misapplies or misinterprets the law. Kenmare Educ. Assn. v. Kenmare Pub. Sch. Dist. #28, 2006 ND 136,

¶ 9, 717 N.W.2d 603. A writ of mandamus requires both a clear legal right to performance of the particular acts sought to be compelled by the writ and that no other plain, speedy, and adequate remedy in the ordinary course of law exists. Wutzke v. Hoberg, 2004 ND 42, ¶ 3, 675 N.W.2d 179.

III

[¶5] On appeal, Lamb argues the district court misapplied the law because Admission to Practice R. 13 is either "subordinate" to N.D.C.C. § 44-04-18 or unconstitutional under N.D. Const. art. XI, § 6. Lamb argues that the Supreme Court does not have the power to promulgate rules that conflict with N.D.C.C. § 44-04-18 and N.D. Const. art. XI, § 6. Therefore, he contends he has established a clear, legal right necessary to grant a writ of mandamus because the records he seeks should be available to the public. We hold that Lamb has not established a clear legal right to a writ of mandamus.

N.D. Const. art. XI, § 6 provides:

> Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.

A similar provision is codified at N.D.C.C. § 44-04-18(1): "Except as otherwise specifically provided by

law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours." Lamb argues that both N.D. Const. art. XI, § 6 and N.D.C.C. § 44-04-18 apply to all of the records of the Board of Law Examiners.

[¶6] We conclude that Admission to Practice R. 13 is neither subordinate to N.D.C.C. § 44-04-18 nor unconstitutional under N.D. Const. art. XI, § 6. Lamb asserts that the language "unless otherwise provided by law" means that only the Legislative Assembly can enact a law to exempt records from public inspection. Therefore, he asserts the Board's records are open to the public absent a statutory provision making the records confidential.

[¶7] Article XI, § 26 of the North Dakota Constitution provides, "The legislative, executive, and judicial branches are co-equal branches of government." This Court has recognized that "the creation of the three branches of government by our constitution operates as an apportionment of the different classes of power whereby there is an implied exclusion of each branch from the exercise of the functions of the others." State v. Hanson, 558 N.W.2d 611, 614 (N.D. 1996). We have also previously recognized, "[t]he term 'by law' is not limited to statute, but includes rules adopted by the Supreme Court pursuant to the court's authority contained in Section 3, Article VI, North Dakota Constitution." Dickinson Newspapers, Inc. v. Jorgensen, 338 N.W.2d 72, 75 (N.D. 1983). Under N.D. Const. art. VI, § 3, this Court has the constitutional authority to promulgate rules regarding the admission of attorneys to practice law in North Dakota:

> The supreme court shall have authority to promulgate rules of procedure, including appellate procedure, to be followed by all the courts of this state; and, unless otherwise provided by law, to promulgate rules and regulations for the admission to practice, conduct, disciplining, and disbarment of attorneys at law.

[¶8] We do not consider the words "unless otherwise provided by law" ambiguous. We note our interpretation is consistent with the history of the legislative resolution proposing the constitutional amendment. The language "unless otherwise provided by law" was not originally included as part of the proposed constitution submitted as part of the 1972 constitutional convention. The language originated in an interim study on unifying the State's court system conducted by the Legislative Council's Judiciary "A" Committee in 1971-1973. The original proposal was:

> SECTION 3. AMENDMENT.) Section 87 of the Constitution of the state of North Dakota is hereby amended and reenacted to read as follows:
>
> . . . .
>
> The supreme court shall have authority to promulgate rules of procedure to be followed by all the courts of this state, and to promulgate rules for the admission to practice, disciplining, and disbarment of attorneys at law.

Minutes of Interim Comm. on Judiciary "A" (Oct. 23, 1972) (considering concurrent resolution amending Article IV of the Constitution). The Judiciary "A" Committee amended the proposal to include the "unless otherwise provided by law" language:

> IT WAS MOVED BY REPRESENTATIVE McGAUVRAN AND SECONDED BY SENATOR COUGHLIN that Section 3 be adopted as presented. THIS MOTION WAS LATER WITHDRAWN.
>
> Mr. Pederson, discussing Lines 17 and 18, Page 2, inquired as to how the Supreme Court could be responsible for disciplining attorneys if it hadn't adopted standards of conduct by which those attorneys would have to abide. In addition, he wondered whether the section could possibly suggest that an attorney would be immune from criminal liability, and would only be subject to disciplining or disbarment by the Supreme Court. The Committee consensus was that the section could not be construed as providing attorneys with an immunity from criminal liability. Mr. Pederson suggested that the word "conduct," be added after the word "practice" in Line 18, Page 2, to ensure that the Supreme Court would also have the power to promulgate rules which would set forth standards of conduct for attorneys.

The Committee discussed at length the problems which courts were having with attorneys who felt that it was necessary, in the defense of a criminal client, to attack the judicial system and the trial court.

Judge Knudson suggested that all the language in Line 17 after the word "state" be deleted, and that Line 18 be deleted. Mr. Kirby disagreed and felt that the court should have the power provided in the present draft, but felt that the word "conduct" should be added after the word "practice" in Line 18, Page 2. Senator Barth suggested that perhaps someone, or somebody besides the Supreme Court should have the power to discipline attorneys. Mr. Pederson suggested that the problem might be solved if Line 18, Page 2 were stricken, and the words "for the conduct of law" were added in lieu thereof.

Judge Glaser read certain sections in Chapter 27-11 indicating that the Supreme Court presently has power to promulgate rules concerning admission of attorneys, practice in civil courts, and practice in criminal courts. Thereafter, MR. PEDERSON MOVED that Lines 16, 17, and 18, Page 2 (Section 3) be deleted. THIS MOTION FAILED FOR LACK OF A SECOND.

IT WAS MOVED BY JUDGE KNUDSON AND SECONDED BY MR. PEDERSON that a period be placed after the word "state" in Line 17 and that the balance of that line, and Line 18, Page 2 be deleted.

JUDGE TEIGEN MOVED AN AMENDED TO THAT MOTION to add the words "when authorized by law" after the word "and" in Line 17, Page 2; and add the word "conduct" after the word "practice" in Line 18, Page 2. THIS MOTION DID NOT RECEIVE A SECOND.

Judge Heen suggested that the words ", unless otherwise provided by law," be added after the word "and" in Line 17, Page 2; and the word "conduct" be added after the word "practice" in Line 18, Page 2.

IT WAS MOVED BY JUDGE TEIGEN, SECONDED BY SENATOR HOLAND, AND CARRIED that Judge Knudson's amendment be amended by deleting all prior amendments and adding the words ", unless otherwise provided by law," after the word "and" in Line 17, Page 2; and adding the words "and regulations" after the word "rules" in Line 17, Page 2; and adding the word "conduct" after the word "practice", in Line 18, Page 2.

> REPRESENTATIVE McGAUVRAN'S MAIN MOTION TO ADOPT SECTION 3 THEN CARRIED, and Section 3 was adopted as amended.

Minutes of Interim Comm. on Judiciary "A" 7-8 (Oct. 23, 1972) (considering concurrent resolution amending Article IV of the Constitution). The final report of the North Dakota Legislative Council to the 43rd Legislative Assembly recommended a concurrent resolution which would create a new Article of the Constitution creating a unified court system:

> Section 3 of the Article gives the Supreme Court the power to promulgate rules of procedure, including appellate procedure, which will be followed by all of the courts of the State. That court is also given power to regulate admission to the practice of law, and to handle discipline and disbarment of lawyers. The Supreme Court currently has these powers under the present Constitution and statutes.

Report of the N.D. Legislative Council to the 43rd Legislative Assembly, 77 (1973). The resolution was considered during the 1973 Legislative Assembly as Senate Concurrent Resolution 4003, but was postponed. In 1975, the proposal was considered as House Concurrent Resolution 3056, and the Legislative Assembly adopted the resolution. 1975 N.D. Sess. Laws ch. 615. The voters approved the provision in 1976. 1977 N.D. Sess. Laws ch. 599. The resolution became Article VI, Section 3 of the North Dakota Constitution.

[¶9] The history indicates that the motivation of the Interim Comm. on Judiciary "A" to include "unless otherwise provided by law" was to clarify that attorneys were not immune from criminal liability for conduct which could also subject them to discipline or disbarment by this Court. The Legislative Assembly has also recognized this Court has the authority to admit attorneys to the Bar of North Dakota. See N.D.C.C. § 27-11-02; Lashkowitz v. Disciplinary Bd., 410 N.W.2d 502, 504 (N.D. 1987) ("N.D.C.C. § 27-11-02 authorizes us to admit persons to practice as attorneys in this state. . . . Pursuant to our authority, we have adopted rules for admission to practice, rules of professional responsibility, and rules of disciplinary procedure.") See generally N.D.C.C. ch. 27-11 (governing admission to the North Dakota Bar). In addition to both constitutional and statutory authority, we have long recognized our inherent authority over attorneys in this state. See, e.g., In re Simpson, 9 N.D. 379, 83 N.W. 541, 553 (1900) (holding that "[a]ny court having the right to admit attorneys to practice, and in this state that power is vested in this court, has the inherent right in the exercise of a sound judicial discretion, to exclude them from practice," and "this inherent power in the judiciary cannot be defeated by the legislative or executive departments"); N.D. Const. art. XI, § 26 ("The legislative, executive, and judicial branches are co-equal branches of government."). This power has also been generally recognized in other jurisdictions:

> Under most constitutions, the sounder and better supported doctrine seems to be that, in the exercise of its police power, in the interest and for the protection of the general public, a

> legislature may, with entire validity, reasonably regulate admissions to the bar, but that any statutory provision which, as put into effect, involves interference with, or frustration of, the courts in the performance of their duties and functions cannot be regarded as valid. Furthermore, the act of admitting attorneys to practice is in most jurisdictions regarded as exclusively for the courts, as is the final determination in regard to the fitness and qualifications of particular persons, and the courts, acting therein, may exercise judicial power to reject an applicant for unfitness, notwithstanding he may have met the terms of existing statutes and under the provisions thereof appears fully entitled to admittance.

W. W. Allen, Annotation, Power of Legislature Respecting Admission to Bar, 144 A.L.R. 150 (1943; 2009 ed.).

[¶10] Under the constitutional authority to promulgate rules that govern the admission to practice law in North Dakota, this Court adopted the Admission to Practice Rules. In 1990, we adopted a rule specifically exempting board records from public disclosure. Admission to Practice R. 13, Comment. Admission to Practice R. 13(A) provides that "[a]ll records maintained by the Board regarding applications for admission to practice law, all examination materials, and all proceedings by the Board shall be confidential except as provided by

these rules." The records exempted are listed as follows:

1. the name and last address provided of each applicant;

2. pre-legal colleges attended by each applicant;

3. law schools attended by each applicant;

4. whether an applicant is currently admitted to practice under rule for Limited Practice of Law by Law Students (Senior Practice Rule);

5. names and addresses of persons who have passed the examination and have met all the requirements for admission to practice;

6. whether an applicant has been admitted with conditions; and

7. statistical summaries as may be authorized by the Supreme Court.

Admission to Practice R. 13(A). Under Admission to Practice R. 13, the records Lamb requested are confidential because they do not fall under any exception. Rule 13, Admission to Practice R., was adopted in 1990 and has been in use now for nineteen years. In adopting Rule 13, this Court considered N.D. Const. art. XI, § 6 and N.D.C.C. § 44-04-18. See Brief of Petitioner, In the Matter of the North Dakota State Bar Board; No. 900022 (N.D. Sup. Ct., April 18,

1990). "Where courts of this State have construed [a] statute and such construction is supported by the long acquiescence on the part of the legislative assembly and by the failure of the assembly to amend the law, it will be presumed that such interpretation of the statute is in accordance with legislative intent." City of Bismarck v. Uhden, 513 N.W.2d 373, 376 (N.D. 1994). Other jurisdictions have also concluded that the courts can exempt processes regarding admission to the bar from public disclosure. See, e.g., Bester v. Louisiana Supreme Court Committee on Bar Admissions, 779 So.2d 715, 724 (La. 2001) (holding that the Louisiana Supreme Court has inherent authority to regulate all facets of the practice of law in Louisiana and to exercise that authority by promulgating a bar admissions regulatory scheme that exempts bar records from public disclosure); Connecticut Bar Examining Committee v. Freedom of Information Comm'n, 550 A.2d 633, 636 (Conn. 1988) (pointing out that the courts make the final decision regarding admissions, and because the bar examining committee acts as an arm of the court, the committee can justifiably refuse public disclosure when it is performing "adjudicative" functions); Florida Bd. of Bar Examiners Re: Amendments to the Rules of the Supreme Court of Florida Relating to Admissions to the Bar, 676 So.2d 372 (Fla. 1996) (citation omitted) (providing "'all court records presently deemed to be confidential by court rule, including the Rules for Admission to the Bar' shall be confidential and therefore exempt from public access under the constitutional provision"); Pasik v. State Bd. of Law Examiners, 478 N.Y.S.2d 270, 273 (N.Y. App. Div. 1984) (concluding that a bar admission applicant was not entitled to various information concerning his bar examination scores because the process of admission

is a judicial function and the legislature did not intend to interfere by enacting the freedom of information law); Mrotek v. Nair, 231 A.2d 95, 96-100 (Conn. Cir. Ct. 1967) (affirming dismissal for a lack of jurisdiction in a case in which an applicant to the bar sought to review bar examining committee records because the superior court had the sole and exclusive power to admit persons to the bar). See generally Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978) ("It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes."); Dodrill v. Arkansas Democrat Co., 590 S.W.2d 840, 844 n.7 (Ark. 1979) ("Application for and administration of the bar examination are not matters of public record. To preserve the integrity of the admission process these matters of necessity must be closely guarded and uncompromised by public dissemination."). But see, Application of Peterson, 459 P.2d 703, 709 (Alaska 1969) (holding that, under procedural due process, an applicant should have been given access to his examination questions, answers, and the model answers, as well as a representative sampling of papers of other applicants who received passing and failing grades).

[¶11] Further, Lamb argues the information he seeks does not fall under N.D.C.C. § 44-04-18.8. Under N.D.C.C. § 44-04-18.8, the following records are exempt from N.D.C.C. § 44-04-18, and N.D. Const. art. XI:

> [E]xamination or testing questions, scoring keys, and other data used to

> administer any licensing, employment, academic, or certification examination or test, if the examination or test is to be used again in whole or in part; and records establishing examination or test procedures and instructions regarding the administration, grading, or evaluation of any examination or test, if disclosure may affect scoring outcomes.

We have concluded that Admission to Practice R. 13 controls the records sought in this case. We note that Admission to Practice R. 13 is not inconsistent with the approach taken by the legislature under N.D.C.C. § 44-04-18.8.

IV

[¶12] We have considered the remaining arguments raised by Lamb and determine them to be unnecessary to our decision or without merit. We affirm the orders of the court, concluding the district court did not abuse its discretion in denying Lamb's application for a writ of mandamus and his motion to reconsider because Lamb does not have a clear legal right to the requested information.

[¶13] Mary Muehlen Maring
Daniel J. Crothers
Dale V. Sandstrom
Carol Ronning Kapsner
Gerald W. VandeWalle, C.J.

IN DISTRICT COURT, GRAND FORKS COUNTY, NORTH DAKOTA

MEMORANDUM DECISION AND ORDER

Civil No. 08-C-1963

Timothy C. Lamb, Petitioner,

v.

State Board of Law Examiners,
State of North Dakota, Respondent.

Before the court for consideration is Petitioner Timothy C. Lamb's November 20, 2008 Application for Writ of Mandamus "to compel the North Dakota State Board of Law Examiners to comply with the open records law under NDCC § 44-04-20." [Petitioner's Brief, paragraph 1.] Specifically, he asks the Board "to provide the information and documentation requested by [him] regarding the February 2008 bar exam procedures, including e-mails, phone messages, letters, memoranda, notes, minutes of meetings, training materials, and all relevant documentation". [Petitioner's Application, paragraph 4.] As background and in support of his request, the Petitioner attached Exhibits A-D to his accompanying Affidavit, as well as a Brief in Support of Writ. On December 3, 2008, the Respondent filed a Brief in Opposition to Application for Writ of Mandamus. Among the three attachments to that Brief was an Affidavit of Courtney M. Koebele, the Assistant Bar Admissions Administrator for the Respondent. The gut issue is whether or not Mr. Lamb has a clear legal right to

the information he seeks.

Hearing on Petitioner's Application was held before the undersigned on December 3rd. Mr. Lamb appeared *pro se*. Attorney Ronald H. McLean represented the Respondent. The Petitioner asserts that, in light of the North Dakota open records law which is codified in N.D.C.C. Ch. 44-04, the State Board of Law Examiners has unlawfully denied him access to the information he has requested to examine, information which he has a clear legal right to have access to.

N.D.C.C. § 32-34-01 governs the issuance of the writ which Mr. Lamb seeks. That statute provides that:

> The writ of mandamus may be used by the supreme and district courts to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled and from which the party is precluded unlawfully by such interior tribunal, corporation, board, or person.

As indicated above, N.D.C.C. Ch. 44-04 sets forth the open records law of this state. Section 44-04-18 of the Century Code addresses the issue of disclosure of public records. Of relevance to this matter are certain exceptions which the North Dakota legislature has promulgated with regard to disclosure of such records and materials.

N.D.C.C. § 44-04-18.8 states as follows:

> The following records are not subject to section 44-04-18 and section 6 of article XI of the Constitution of North Dakota: examination or test questions, scoring keys, and other data used to administer any licensing, employment, academic, or certification examination or test, if the examination or test is to be used again in whole or in part; and records establishing examination or test procedures and instructions regarding the administration, grading, or evaluation of any examination or test, if disclosure may affect scoring outcomes.

Under the North Dakota State Constitution, Article VI, Section 3, our state Supreme Court has the authority to promulgate rules and regulations for the admission to practice as an attorney at law in North Dakota. The North Dakota Supreme Court has utilized that authority by adopting Admission to Practice Rules. Rule 13, Admission to Practice Rules, provides in relevant part that "all records maintained by the [State Board of Law Examiners] regarding applications for admissions to practice law, all examination materials, and all proceedings by the Board shall be confidential except as provided by these rules." This court was unable to identify any confidentiality exceptions relevant to this case in those Rules.

Based upon the foregoing, this court determines that the Petitioner has failed to establish that the additional information he seeks comes within an exception to the confidentiality provisions of the North Dakota Admission to Practice Rules, or

that it is not included within the open records exception outlined in N.D.C.C. § 44-04-18.8. Therefore, he does not have a clear legal right to that information. This court does note that, on May 7, 2008, the State Board of Law Examiners did in fact provide the Petitioner with a copy of his two personal Multistate Performance Test (MPT) question and answer booklets and with the drafter's point sheet and model answers for each, as well as with a copy of his personal six Multistate Essay Examination (MEE) question and answer booklets and the analyses for those questions. The court notes further that the Petitioner was also provided with a copy of the North Dakota State Board of Law Examiner's Grading Guidelines following the December 3rd hearing.

The Petitioner's Application for a Writ of Mandamus directing the State Board of Law Examiners to provide him with the additional information he seeks is DENIED.

Dated this 31st day of December 2008.

BY THE COURT:
/s/
Lawrence E. Jahnke
District Judge

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No. 09-1213

Supreme Court, U.S.
FILED
MAY 10 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TIMOTHY CHARLES LAMB,

Petitioner,

v.

STATE BOARD OF LAW EXAMINERS,
STATE OF NORTH DAKOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH DAKOTA

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The issue presented for review is: Whether the Petitioner's rights under the due process clause of the Fourteen Amendment to the United States Constitution are implicated by the opinion below or by application of Rule 13(A) of North Dakota's Admission to Practice Rules.

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STATEMENT OF JURISDICTION

This court has subject matter jurisdiction over this case under 28 U.S.C. § 1257(a), which confers jurisdiction on the court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

Petitioner was a candidate for the February 2008 bar examination as administered by Respondent. Based on the results of his examination, Respondent recommended to the North Dakota Supreme Court that Petitioner not be admitted to the Bar of North Dakota. Petitioner then requested a formal hearing under North Dakota's Admission to Practice Rules. Prior to that hearing taking place, Petitioner sought discovery of certain information concerning, *inter alia*, scoring methodology and procedures used to train examination graders.[1] Petitioner's request was denied, but he was

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1. Specifically, Petitioner sought information pertaining to: (1) grading techniques; (2) how raw scores are converted; (3) whether the Board performs periodic assessments of its scores; (4) whether a report is available of psychometric procedures; (5) whether the Board has an ongoing assessment of its procedures; (6) what practices the Board uses in maintaining acceptable standards; (7) how the essay scoring judges are trained; (8) whether a content analysis has been conducted to measure the relationship between questions and competency in the legal profession; and (9) security measures and related bar examination information.

provided certain information concerning grading guidelines and selection of test questions.[2]

Petitioner then moved for a writ of mandamus in the trial court claiming the information he sought was subject to North Dakota's open records law, codified at N.D. Cent. Code Ch. 44-04 *et. seq.* The trial court refused to issue the writ. Notably, Petitioner did not raise any due process argument in the trial court. Petitioner then appealed to the North Dakota Supreme Court, which affirmed the trial court. *Lamb v. State Bd. of Law Examiners*, 2010 ND 11 ¶ 1, 777 N.W.2d 343. The North Dakota Supreme Court held Petitioner did not have a clear legal right to the information he sought under North Dakota law and, therefore, the trial court had not misapplied the law when it denied Petitioner's request for a writ of mandamus. Notably, the North Dakota Supreme Court concluded the trial court had not misapplied the law because the admission to practice rules governing admission to the Bar of North Dakota were neither subordinate to North Dakota's open records law nor unconstitutional under the North Dakota Constitution. This request for writ of certiorari followed.

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2. Specifically, Respondent provided information pertaining to: (1) selection and preparation of graders; (2) grading guidelines given to graders; (3) selection of test questions; (4) how often the pass fail policy is reviewed; (5) where the conversion and scaling of scores are performed; and (6) where the Multistate Performance Test and Multistate Essay Examination questions are prepared.

REASONS FOR DENYING THE PETITION

The Petitioner seeks a writ of certiorari from the 2010 decision of the North Dakota Supreme Court, which held he had no clear legal right under North Dakota law to information he sought concerning procedures surrounding the administration of the February 2008 bar examination.

The petition for certiorari should be denied in the first instance because the decision of the North Dakota Supreme Court did not decide an important federal question. Rather, the decision involved an issue of state law. Petitioner has not demonstrated that there is a conflict in the decisions announced from other courts of last report or among the United States courts of appeal warranting a grant of certiorari. Petitioner has not demonstrated he has been deprived of a property right, nor has Petitioner demonstrated he has been deprived of fair process. The North Dakota Admission to Practice Rules are not vague or overbroad so as to be unconstitutional. Finally, the opinion below did not decide an important unsettled question of federal law or an important question of federal law that conflicts with decisions of this Court. For these reasons, certiorari is not warranted.

I. The Opinion Below did not Decide an Important Federal Question in a Way that Conflicts with Another State Court of Last Resort or United States Court of Appeal Opinion

The opinion below addressed Petitioner's argument that Rule 13 of North Dakota's Admission to Practice Rules was "subordinate" to Section 44-04-18 of the North Dakota Century Code, or that it was unconstitutional under Article XI, Section 6 of the North Dakota Constitution. Petitioner urged that since the rule was either "subordinate" or unconstitutional, the trial court had misapplied North Dakota law concerning the issuance of a writ of mandamus. *See* N.D. Cent. Code § 32-34-01 (governing the issuance of a writ of mandamus under North Dakota law).

Petitioner has not cited any other state court of last resort with which the opinion below conflicts. Nor has Petitioner cited any court of appeal decision that conflicts with the opinion below. In fact, the Court of Appeals for the Eight Circuit decided a case very similar to the one here. In *Fields v. Kelly*, 986 F.2d 225, 227 (8th Cir. 1992) a failed bar applicant, Fields, sued the North Dakota Bar Board claiming it had deprived him of due process. Fields was provided copies of the North Dakota essay questions, model answers and copies of his own answers. *Id.* at 227. He was also provided with copies of the multistate examination and his answers. *Id.* The court rejected his due process argument. Noting that Fields' "due process argument varies from the usual argument of the disappointed bar applicant" in that Fields sought access to "public records," the court held that no process had been denied him. *Id.* at 228.

Other courts of appeal cases have held that failed bar applicants have limited rights to information concerning the bar examination. For example, in *Davidson v. State of Georgia*, 622 F.2d 895 (5th Cir. 1980) the court rejected an applicant's contention that he was deprived of due process by the Georgia board of law examiners. *Id.* at 876; *see also Brewer v. Wegmann*, 691 F.2d 216 (5th Cir. 1982), cert. denied 461 U.S. 908. Similarly, in *Whitfield v. Ill. Bd. of Law Examiners*, 504 F.2d 474 (7th Cir. 1974) a due process attack was rejected. The court noted that admission to the bar of a state is "primarily a matter of state concern" and that a federal court is not justified in interfering with a board charged with determining which individuals have the requisite knowledge and skill to practice unless there is proof that the determination was made based on a constitutionally impermissible reason. *Id.* at 477 (citing *Schware v. Bd. of Bar Examiners*, 353 U.S. 232, 248 (1957) and *Douglas v. Noble*, 261 U.S. 165 (1923)). In *Sutton v. Lionel*, 585 F.2d 400, 402 (9th Cir. 1978) the court recognized a failed applicants right to inspect his own examination, but denied his petition for other relief such as a hearing before the bar examiners, for model answers to his examination, and for a representative sampling of other applicants examination papers and concluded he was not denied due process. *Id.* at 403. *See also Giannini v. Real*, 911 F.2d 354, 357 (9th Cir. 1990)(holding that applicant was not denied due process).

State court opinions have similar reasoning. E.g., *Taylor v. Safly*, 637 S.W.2d 578 (Ark. 1982); *In re Mead*, 361 N.E.2d 403 (Mass. 1977).

As these cases illustrate, there is no conflict among the courts of appeal or among the state courts of last result. Petitioner has not advanced any authority to the contrary.

II. The Opinion Below did not Decide an Important Unsettled Question of Federal Law or an Important Question of Federal Law that Conflicts with Decisions of this Court

There can be no question that the opinion below was decided on state law grounds. *Lamb*, *supra*, at ¶ 5, 777 N.W.2d at 345. Accordingly, only if the opinion below conflicts with decisions of this Court is certiorari warranted.

A. No Authority Supports Petitioner's Argument that he has been Deprived of a Property Right

Petitioner nevertheless argues his procedural due process rights have been infringed insofar as the opinion below did not permit him access to information sought from Respondent. To be sure, if a legitimate liberty or property interest is being taken, the due process clause may be implicated in certain circumstances. Here, however, Petitioner has failed to cite any precedent standing for the proposition that his due process rights have been infringed or that the opinion below is in conflict with decisions of this Court. Tellingly, Petitioner alleges the right he allegedly has been deprived of is the "right to access public record information" in connection with the February 2008 bar examination. In effect, Petitioner argues that he has a "right" to access information that has been classified as confidential

under North Dakota's Admission to Practice Rules. Petitioner cites no authority that squarely supports this proposition.

While it is well settled that "property" includes more than personal belongings or money, it is not enough to have an abstract need or desire for a benefit. Instead, Petitioner must demonstrate that he has a legitimate claim or entitlement to his claimed benefit under state or federal law. *Bd. of Regents v. Roth*, 408 U.S. 564 (1972). The jurisprudence of this Court has established, for example, that there is a "property" interest in public education when school attendance is required. *Goss v. Lopez*, 419 U.S. 565 (1975). Similarly, under certain circumstances, an individual can have a "property" interest in welfare benefits. *Goldberg v. Kelly*, 397 U.S. 254 (1970). There may also be a "property" interest in continued public employment. *Arnett v. Kennedy*, 416 U.S. 134 (1974).

Petitioner cites no persuasive precedent for his argument the abstract desire to review "public record information" involves a "property" right under the due process clause. Instead, Petitioner cites *Marshall v. Jerrico, Inc.*, 446 US 238 (1980) and argues that the due process clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. With this proposition Respondent has no quarrel. Petitioner certainly has not demonstrated that the tribunal in this case was not impartial or disinterested. Quite clearly, *Marshall v. Jerrico*, *supra*, has no application here. Instead, Petitioner simply complains that his right to due process was "deprived" because he was denied information that is in the "public domain."

Petitioner relies on *Greene v. McElroy*, 360 U.S. 474 (1959) for the proposition that the revocation of a security clearance (which resulted in termination of employment) is analogous to his case. Petitioner's argument is misplaced. First, the Court in *Greene, supra*, was confronted with a petitioner who had been granted a security clearance by the government and which the government later revoked. *Id.* at 476. While the Court noted that the "right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment[,]" the Court was primarily concerned with the lack of opportunity for confrontation and cross-examination provided to the petitioner. *Id.* at 492-93 (citing *Dent v. State of West Va.*, 129 U.S. 114 (1889); *Schware v. Bd. of Law Examiners*, 353 U.S. 232 (1957)). Here Petitioner has been deprived of no such opportunity despite urging the contrary. Petitioner has been provided with certain information concerning the administration of the examination. Importantly, the facts discussed in *Greene* which Petitioner points to are absent here. Certainly had Petitioner been admitted to the bar and subsequently had his license revoked without the benefit of a hearing with cross examination he would be better served to advance *Greene*. But those facts are absent here. Petitioner has not yet even had the formal hearing he requested. There is no conflict with the Court's holding in *Greene* and the opinion below.

Petitioner also advances *Zinermon v. Burch*, 494 U.S. 113 (1989) and *Brewer v. Chauvin*, 938 F.2d 860 (8th Cir. 1991) claiming the opinion below is in conflict with these decisions. Petitioner's arguments are unavailing.

First, *Zinermon, supra*, involved the deprivation of liberty when Burch was admitted to a psychiatric hospital without adequate pre-deprivation safeguards. *Id.* at 115. The Court granted certiorari to resolve a conflict in the courts of appeal arising from the scope of a rule announced in *Parratt v. Taylor*, 451 U.S. 527 (1981). No such conflict is evident here.

Similarly, *Brewer v. Chauvin, supra*, does not aid Petitioner. In that opinion a deputy sheriff had been terminated from his employment without a hearing. *Id.* at 862. The deputy then filed a 42 U.S.C. § 1983 action. The issues in the case were whether the back pay awarded to the deputy was erroneously awarded since the district court did not conduct an evidentiary hearing on the issue. The opinion does not stand for the proposition that due process requires access to information that is confidential under law.

Petitioner's arguments are clearly unavailing insofar as he has not demonstrated that he is entitled, as a "property" right, to confidential information. For these reasons, the Petition should be denied.

B. No Authority Establishes Petitioner has been Deprived of "Process."

It is well established that a deprivation of liberty or property by government must be conducted in accordance with fundamental notions of fairness. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)(involving deprivation of social security disability benefits); *Goldberg v. Kelly, supra*, at 262 (involving termination of welfare benefits); *Cleveland Bd. of Ed. v. Loudermill*,

470 U.S. 532, 538 (1985)(termination of public school employees)).

Here, however, Petitioner does not claim that he has been denied the opportunity to appear before Respondent in connection with his application to North Dakota's bar. Rule 10(B), N.D. Admission to Practice R. This is as it must be, since the hearing pursuant to North Dakota's admission to practice rules has not taken place yet. Petitioner acknowledges this fact. It follows, then, that Petitioner has not been denied any "process" under law.

C. No Authority Supports Petitioner's Argument that Rule 13 of North Dakota's Admission to Practice Rules is so Vague or Overbroad as to be Unconstitutional

Petitioner asserts that Rule 13(A) of North Dakota's Admission to Practice Rules is vague and overbroad. That rule provides, in relevant part, that "[a]ll records maintained by the Board regarding applications for admission to practice law, *all examination materials*, and all proceedings by the Board shall be confidential except as provided by [the admission to practice rules]." Rule 13(A), N.D. Admission to Practice R. (emphasis added).

The opinion below by the North Dakota Supreme Court analyzed the purpose and authority for the rule. *Lamb*, *supra*, at ¶ 7. 777 N.W.2d at 346. First, the opinion noted that the North Dakota constitution delegated authority to the supreme court to promulgate rules regarding the admission of attorneys to the bar. *Id.*

Under that authority the supreme court promulgated the admission to practice rules. The North Dakota legislature has also recognized the supreme court's authority to admit attorneys to the bar. *Id.* at ¶ 9, 777 N.W.2d at 348 (citing N.D. Cent. Code § 27-11-02). The opinion reasoned that the approach taken by the legislature when it enacted North Dakota's open records law, N.D. Cent. Code ch. 44-04 *et. seq.*, was not inconsistent with the admission to practice rules and in particular Rule 13(A). *Id.* at ¶ 11, 777 N.W.2d at 350. Since Rule 13(A) mandates that all examination materials are confidential, Petitioner was not entitled to certain information concerning the administration of the February, 2008 bar examination. *Id.*

Despite the well reasoned opinion below, and the plain and unambiguous language of Rule 13(A), Petitioner argues that Rule 13(A) is "void because it does not give adequate notice of the public records access policy . . . to an applicant who appeals his bar exam results . . . ." Petition at p. 18. This argument is without merit. Rule 13(A) clearly and unambiguously states that "all examination materials" will be confidential.[3] It is therefore a stretch to argue that an

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3. It should be also noted that the approach taken by Rule 13(A) is consistent with North Dakota's open records law which also exempts examination questions and procedures. N.D. Cent. Code § 44-04-18.8. That statute provides:

> The following records are not subject to section 44-04-18 and section 6 of article XI of the Constitution of North Dakota: examination or test questions, scoring keys, and other data used to administer any

(Cont'd)

applicant to the bar of North Dakota does not have notice as to what is considered public record.

Petitioner also claims that the rule is void because "it prohibits 'constitutionally protected' conduct" in that it "prohibits information that should not be considered 'confidential' and denies access during a formal hearing." Petition at p. 18. The confusing logic and unconnected reasoning of this argument underscores its weakness. Petitioner points to no "conduct" that is "protected" in support of his petition. Instead, Petitioner asserts simply that Rule 13(A) is in conflict with *Nat'l Assoc. Advancement of Colored People v. Button*, 371 U.S. 415 (1963), *Grayned v. City of Rockford*, 408 U.S. 104 (1972), *Smith v. Goguen*, 415 U.S. 556 (1974) and *Palmer v. City of Euclid, Ohio*, 402 U.S. 544 (1971).

Nat'l Assoc. Advancement of Colored People v. Button, *supra*, involved the free expression of speech, not the deprivation of due process in circumstances similar to this case. Accordingly, that case is not applicable to the petition. Similarly, *Grayned v. City of Rockford*, *supra*, does not advance Petitioner's arguments. In that opinion, the Court did note that "a basis principal of due process [is] that an enactment is

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(Cont'd)

> licensing, employment, academic, or certification examination or test, if the examination or test is to be used again in whole or in part; and records establishing examination or test procedures and instructions regarding the administration, grading, or evaluation of any examination or test, if disclosure may affect scoring outcomes.

void for vagueness if its prohibitions are not clearly defined." *Id.* at 108. But the Court also noted that "we can never expect mathematical certainly from our language." *Id.* at 110. The Court found that the ordinance at issue in *Grayned* was clear as to what conduct it prohibited. *Id.* No imprecision that was present in the ordinance at issue in *Grayned* is present here. *Id.* at 111. For these reasons, Grayned does not advance Petitioner's cause.

Similarly, *Smith v. Goguen*, *supra*, is also inapplicable. In that opinion, the Court found that a provision of a Massachusetts statute was void for vagueness under the due process clause. *Id.* at 567-68. The Court reached its decision because the Massachusetts statue infringed on expressions sheltered by the first amendment. *Id.* at 573. No such claim is made by Petitioner here. Moreover, unlike *Smith*, which prohibited anyone from publicly treating the flag of the United States "contemptuously", no such vague language is evident in Rule 13 of the North Dakota Admission to Practice Rules. For the same reasons, *Palmer v. City of Euclid, Ohio*, *supra*, is also inapplicable. In that case, the Court found that a criminal statute was unconstitutionally vague on its face. *Id.* at 545. No such vagueness is present here. The statute in *Palmer* gave insufficient notice to an average person that his conduct was impermissible under the statute. Here, of course, the situation is wholly dissimilar. Rule 13 of North Dakota's Admission to Practice Rules clearly and unambiguously prohibits the release of all examination materials. It adequately gives notice to applicants to the bar about what information is confidential. *Palmer* has no application here.

CONCLUSION

The petition for certiorari should be denied in the first instance because the decision of the North Dakota Supreme Court did not decide an important federal question. Rather, the decision involved an issue of state law. Petitioner has not demonstrated that there is a conflict in the decisions announced from other courts of last report or among the United States courts of appeal warranting a grant of certiorari. Petitioner has not demonstrated he has been deprived of a property right, nor has Petitioner demonstrated he has been deprived of fair process. The North Dakota Admission to Practice Rules are not vague or overbroad so as to be unconstitutional. Finally, the opinion below did not decide an important unsettled question of federal law or am important question of federal law that conflicts with decisions of this Court. For these reasons, certiorari is not warranted.

Respectfully submitted,

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No. 09-1213

Supreme Court, U.S.
FILED
MAY 24 2010
OFFICE OF THE CLERK

IN THE

SUPREME COURT of the UNITED STATES

TIMOTHY CHARLES LAMB,

Petitioner,

v.

STATE BOARD OF LAW EXAMINERS,
STATE OF NORTH DAKOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH DAKOTA

REPLY BRIEF

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APPENDIX

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The Bar Examiner, National Conference of Bar Examiners (May 2008)..... 4

ARGUMENT

In response to Respondent's Brief in Opposition, filed on May 10, 2010, Petitioner submits this Reply Brief. In review, the primary issue presented in this case is whether the Petitioner was deprived of his due process rights in a formal proceeding to decide his license and employment opportunities because he was denied discovery of essential, relevant evidence.

I. Respondent's Brief Misrepresented a Material Fact

First, and foremost, Respondent's main argument is premised on a false and misleading representation of the facts. Respondent states that, "Petitioner has not yet even had the formal hearing he requested." Resp. Brief at 8. This statement of fact was repeated later in the brief, stating, "[s]ince the hearing pursuant to North Dakota's admission to practice rules has not taken place yet." Id. at 10. This is an absolute false and misleading statement of fact in this case.[1]

To correct the record before the Court, a copy of the Notice of Hearing is at Appendix 1a. A stay of the proceeding was requested pending the outcome of Lamb's Petition for Writ of Certiorari, but it was denied. See Appendix 2a.

The hearing requested by the Petitioner from

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1. The formal hearing was held at 9:00 a.m., April 9, 2010, in the Lewis and Clark Room, North Dakota State Capitol Building. Present were the three members of the State Board of Law Examiners, their attorney, Ronald H. McLean, and the Petitioner, Timothy C. Lamb.

the results of his February 2008 bar exam took place on April 9, 2010, over two years after the date he requested it. At the hearing, Respondent's attorney acknowledged receiving Petitioner Lamb's Petition for a Writ of Certiorari, filed on April 7, and a copy of it was duly submitted as an exhibit at the hearing. Petitioner was unable to make any substantiated arguments at the hearing, however, because the evidence he sought was suppressed by the board, and that decision was affirmed by the ruling in this matter by the State Supreme Court, which is at issue here. In effect, the hearing was largely a pro forma proceeding to preserve the Petitioner's rights in this matter.

Since he was at the hearing, Respondent's attorney should be held accountable for this virtual fraud on the United States Supreme Court. This misrepresentation is particularly disturbing because it is a material fact, and is being used to persuade the Court into denying cert. In effect, Respondent is misleading the Court into believing that Petitioner's rights have not been violated because the hearing "has not taken place yet." In fact, the hearing did take place, albeit dysfunctional. Our legal system cannot function properly when there is stonewalling and misrepresentation of the relevant facts.

II. Lower Court's Decision Conflicts with Federal Case Law

Second, Respondent's characterization of the law is misleading. Respondent cites that Fields v. Kelly was not in conflict with the lower court's opinion in this matter. Resp. Brief at 4. In fact, in Fields v. Kelly, the federal court stated, in pertinent part, "North Dakota case law also shows that state

courts can grant a writ of mandamus to remedy violations of the North Dakota open records laws, [citation omitted], an option which Fields did not pursue." Fields v. Kelly, 986 F.2d 225, 228 (8th Cir. 1993). This federal ruling conflicts with the lower court's ruling in this case, since the Petitioner sought a writ of mandamus to compel critical evidence from the state board, and was denied. Lamb v. State Board of Law Examiners, 2010 ND 11, 777 NW2d 343 at ¶1. Of note is the fact that the Fields decision came after the adoption of Rule 13, N.D. Admission to Practice Rules, which was in 1990. Id. at ¶10. Rule 13 was the basis for the lower court's decision. Id. at ¶11.

Here, in this matter before the Court, Petitioner's main argument is that his due process rights under the United States Constitution have been infringed upon by the lower court's ruling. The Fields case presented a different set of facts. Indeed, the federal court explained in a footnote that, given the situation, state courts discharge their duties in supervising the admission process, "not interpreting the due process clause of the United States Constitution." Fields, supra, at 227-28, note 3. Thus, state court rulings under these circumstances are not on point. So, there are no conflicting state court opinions.

Further, the federal court held that because Fields had not exercised his right to seek a writ of mandamus to compel certain evidence, his due process rights were not violated. Id. at 228. In this case, Petitioner sought a writ of mandamus and it was denied. He, therefore, had no evidence to support his arguments before his hearing on April 9, 2010. Given the facts in this case before the Court, where Petitioner exercised his right to a remedy and

was denied, the lower court's decision directly conflicts with Fields.

Under the reasoning in Fields, the federal court would likely rule the Petitioner's due process rights have been deprived since Petitioner Lamb has exhausted his legal remedies in seeking discovery of the evidence he needs to prove his case that the bar exam he failed by only a couple of percentage points was flawed. Since only 47 percent passed the exam in February 2008, the flawed assertion may have merit. The 47% pass rate compares to a 76% pass rate in February 2005 bar exam, and an overall 10-year average pass rate of 80% in North Dakota. The Bar Examiner, National Conference of Bar Examiners (May 2008), at 22.

III. The Lower Court's Decision Conflicts with Relevant U.S. Supreme Court Decisions and the U.S. Constitution

The test invalidity assertion in this case is founded on somewhat technical grounds, so other state and federal cases with a similar factual comparison have not been found. However, principles of due process apply, which should take this case beyond the scope of interpreting state laws. Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957) (holding that, "[a] State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but an qualification must have a rational connection with applicant's fitness or capacity to practice law." [Emphasis added, citations omitted.] Petitioner is asserting that the evidence he has been denied will show that there is a lack of "rational connection" in the standard-setting

judgment by the State Board. In Schware, the Court also found that, "[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." Dent v. West Virginia, 129 U.S. 114 (1889), [other citations omitted]. Id.

By denying Petitioner the information he needed to show the State Board was acting arbitrarily and without a "rational connection", the lower court's decision violated the U.S. Constitution.

Experts in the field of testing strongly agree that the evidence Petitioner is seeking should be readily made available for review. See, e.g., Setting Performance Standards: Concepts, Methods, and Perspectives, Gregory J. Cizek, (Lawrence Erlbaum Associates, 2001), at 442 (stating: "Although licensing and certifying examinations have generally withstood judicial scrutiny, it is in the best interest of a licensing authority or certifying entity and the public it serves to have as much evidence as possible available to support its standard-setting judgment."). It follows that such evidence protects the credibility of the exam, the public's interest, as well as the stakeholder's assurance that the exam is reliable, valid and fair.

A test taker is a stakeholder and has a right to take a test that is fundamentally sound under psychometric standards. See, e.g., Standards for Educational and Psychological Testing, (the Standards) published by the American Educational Research Association, the American Psychological Association, the National Council of Measurement in Education, 1966, revised 1999; Standards for the Accreditation of Certification Programs, National Commission for Certifying Agencies, 2004; and Code

of Fair Testing Practices in Education (2004); all suggesting that current technical information to support the reliability, validity, scoring and reporting processes, and other relevant assessments of the testing procedures should be made available to stakeholders.[2] These professional testing standards apply to licensing examinations for certified public accountants, health care providers, architects, and other professional licensing exams. Standards for the Accreditation of Certification Programs, supra.

In Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 1007 (1988), footnote 5, this Court acknowledge the use of the Standards in measuring the reliability, validity and fairness of the EEOC

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2. Citing from Standards for the Accreditation of Certification Programs, National Commission for Certifying Agencies, 2004, which is derived from the Standards, the following standards apply to their professional licensing tests:

Standard 11: "The certification [or licensing] program must employ assessment instruments that are derived from the job/practice analysis and that are consistent with generally accepted psychometric principles."

Standard 12: "Cut scores must be set using information concerning the relationship between assessment performance and relevant criteria based on the standard of competence." ... "A report must be published documenting the methods and procedures used to establish the standard of competence and set the cut score, along with the results of these procedures."

Standard 13: "The [licensing] program must document the psychometric procedures used to score, interpret, and report assessment results."

Uniform Guidelines for testing.

The main issue here comes from the procedural due process right to evidence that supports Petitioner's arguments that the test he failed was flawed. He has had a hearing before a state board that is determining his ability to be licensed to practice law, which impacts his employment opportunity. This right presents a U.S. Constitutional due process issue of federal significance. See, e.g., Greene v. McElroy, 360 U.S. 474 (1959); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Dent v. West Virginia, 129 U.S. 114 (1889).

This Court has authority to settle the federal issue presented in this case. The lower court was presented with the U.S. Constitutional federal question, and it stated, "We have considered the remaining arguments raised by Lamb and determine them to be unnecessary to our decision or without merit." Lamb v. State Board of Law Examiners, supra, at ¶12.

Certiorari should be granted because this Court has a long history of ensuring that the due process clause of the U.S. Constitution is adhered to by the States. There is no reason to deny Petitioner the right to review critical evidence that the State Board has in its possession, which would allegedly show that the bar exam has a flawed "rational connection." By denying the information, the Board is only hiding behind a cloak of secrecy it deems "confidential" under Rule 13, N.D. Admission to Practice Rules, which indicates a lack of examination credibility. The bar exam's development and administration is not a matter of being confidential, it's a matter of integrity, validity, reliability and fairness of the examination process. By denying the

evidence requested, more questions are raised about the credibility, validity and integrity of the exam. This is not a "confidential" matter, it is information that the public has a right to know, as well as do the examinees, according to experts in the field of test measurement. Standards, supra.

IV. The Denied Information Leads to Whether the State Board Acted Arbitrarily and Without a "Rational Connection"

At stake here is whether a state can lawfully deprived a person of information that may lead to the conclusion that an arbitrary mistake was made in determining whether to recommend a license based on a flawed exam. The evidence Petitioner is seeking will show whether or not the state is following generally acceptable standards in administering the bar exam and there exists a "rational connection" in its standard-setting judgment. That is a due process issue that this Court has authority to oversee as shown in supporting case law, Greene, Schware, supra.

The issue before the Court is about accountability, enforcing professional testing standards, and the integrity of the bar exam. Petitioner has a right to evidence that may show the board is not administering the exam properly, which will determine if the State Board acted arbitrarily, capriciously, and without rational basis. This is a professional, high stakes exam, and it must comport with professional standards in test development and administration. The evidence Petitioner seeks is about the testing standards, and not about the state's authority to admit licensed attorneys, which is well settled law. Schware, supra.

For example, if the minutes of the State Board's meeting were available for review, it could be ascertained whether the board was properly reviewing the cut score and whether there was discussion relating to the rational basis for determining the cut score. But the board's minutes are "confidential" under Rule 13, North Dakota Admission to Practice Rules. Also denied was information relating to how the graders were trained, whether their ratings have been calibrated to ensure consistency under psychometric standards, whether proper security measures are being maintained, and whether psychometric standards are being used to ensure that the standard of "minimum competency" to practice law is being tested by the bar exam. These are relevant questions that are pertinent to whether there is a "rational connection" to the test standards and the judgments made based on those standards. The Petitioner was denied the information relating to them. Lamb, supra, at ¶3.

Whether a state board's actions were arbitrary was the issue in In Re Reardon, 378 A.2d 614, 618 (Del.Supr. 1977) (finding that, "[t]he primary function of the Board of Bar Examiners is to measure professional competence; the purpose of the Bar Examination is to distinguish those applicants who appear to have the minimal competence for the practice of law." Id.

An expert psychometrician would have provided an expert opinion of the State Board's standard-setting judgment if given relevant examination information, but the evidence was suppressed. Under the Standards, supra, licensing authorities, like the State Board in this instance, have a responsibility for providing technical

REPLY BRIEF APPENDIX

Notice of Hearing

Notice of formal hearing for
Timothy Charles Lamb for the
February 2008 bar exam..... 1a

Order

Order Denying Motion for Stay
Pending the Outcome of the
Petition for Writ of Certiorari..... 2a

In The Matter of the Request for a Formal Hearing of Timothy Charles Lamb February 2008 Bar Exam	))))	NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that pursuant to Rule 10(B)(3), Admission to Practice Rules, a formal hearing in this matter has been set before the North Dakota State Board of Law Examiners, commencing at 9:00 a.m. Central Time on the 9th day of April, 2010, in the Lewis and Clark Room in the State Capitol Building, Bismarck, North Dakota.

The Petitioner's pre-hearing brief is due on March 23, 2010, and the Board's pre-hearing brief is due on April 5, 2010.

Petitioner is hereby advised that he has the right to be represented by counsel and to present witnesses on his own behalf.

Dated this 11th day of March, 2010, at Bismarck, North Dakota.

/s/
Courtney Koebele
Assistant Bar Admissions
Administrator
State Board of Law Examiners

STATE OF NORTH DAKOTA
STATE BOARD OF LAW EXAMINERS
FORMAL HEARING PANEL

In the Matter of the Formal Hearing Regarding the Application of Timothy Charles Lamb for Admission to the Bar of North Dakota Based on February 2008 Bar Examination	)	**ORDER**

On March 22, 2010, Timothy Lamb filed a Motion for Stay of these proceedings "until the judicial process of a petition for a writ of certiorari by the United States Supreme Court is decided regarding the North Dakota Supreme Court's decision, Lamb v. State Board of Law Examiners, 2010 ND 11, 777 N.W.2nd 343, N.D. Supreme Court No. 20090131." The Hearing Panel considered the matter, and

ORDERED, that the Motion for Stay is DENIED.

Dated this 25th day of March, 2010.

/s/
Mark Stenehjem, Chair
Hearing Panel